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BEFORE THE FEDERAL ELECTION COMMISSION

In the matter of

1099 L.C. d/b/a Venice Nissan

Donald M. Caldwell

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GENERAL COUNSEL'S REPORT # 4

I. **ACTIONS RECOMMENDED:** (1) Find probable cause to believe that 1099 L.C. d/b/a Venice Nissan¹ knowingly and willfully violated 2 U.S.C. §§ 441f and 441a(a); (2) find probable cause to believe that Donald M. Caldwell knowingly and willfully violated 2 U.S.C. § 441f; and (3) approve the attached conciliation agreement.

II. **BACKGROUND**

This matter primarily concerns the reimbursement of political contributions to Vern Buchanan for Congress ("VBFC"), the principal campaign committee of Rep. Vernon G. Buchanan, by 1099 L.C. d/b/a Venice Nissan ("VN"), an auto dealership in which Mr. Buchanan is the majority owner, in violation of 2 U.S.C. § 441f.

Donald Caldwell is the General Manager of VN and reports directly to Shelby Curtsinger, Buchanan's business partner responsible for operating VN. According to documents provided by VN and the testimony of Caldwell and Christina Hires, the VN Controller/Office Manager, Caldwell requested that the VN accounting office provide him with \$5,000 cash in September 2005. The VN accounting office prepared and cashed a VN check for \$5,000 on September 16, 2005. That same day, Caldwell received the cash, gave \$1,000 to each of his five subordinate managers (Carlo Bell, Jack Prater, William Mullins, Marvin White, and Jason Martin), and

¹ In 2009, 1099 L.C. changed its business name from Venice Nissan Dodge to Venice Nissan following the loss of its Dodge franchise as a result of Chrysler's bankruptcy. The current name is used in this report.

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1 directed them to use the cash to make contributions to VBFC. Within one day, all five of
2 Caldwell's subordinates made \$1,000 contributions to VBFC. The contributions of the five
3 Caldwell subordinates, as well as contributions from Caldwell and several of his relatives, were
4 then forwarded to VBFC in a single VN envelope bearing the name "Shelby."

5 On April 15, 2010, this Office served the General Counsel's Brief ("the GC Brief"),
6 incorporated herein by reference, to VN and Caldwell. The GC Brief sets forth the factual and
7 legal issues upon which this Office recommends that the Commission find probable cause to
8 believe that the respondents violated the Act. On May 5, 2010, VN and Caldwell submitted a
9 brief in response ("Respondents' Brief").

10 Although VN and Caldwell contend that the \$1,000 cash that Caldwell gave to each of
11 his subordinates was a routine bonus, and was not given for the purpose of reimbursing their
12 contributions to VBFC, the evidence gathered in the course of the investigation indicates
13 otherwise. Specifically, VN accounting records produced in response to the Commission's
14 subpoena demonstrate that, unlike every other VN check that was cashed to pay cash bonuses in
15 the five-year period from 2003 to 2007, the \$5,000 check at issue in this matter did not contain a
16 notation that it was to be used to pay for a bonus. Furthermore, although Shelby Curnisiger
17 testified that cash bonuses must be recorded in the VN payroll system for tax and other purposes,
18 the \$1,000 cash payments to the five Caldwell subordinates were not recorded in the VN payroll
19 system as would be expected for cash bonuses.

20 In addition, Caldwell testified that although he had no records or memory of the bonuses,
21 he concluded that the payments were "Fast Start" bonuses based on information provided by the
22 recipients still under his supervision (Prater, Mullins, White, and Martin) and Christina Hires
23 (the VN controller/office manager) when this matter arose. However, contrary to Caldwell's

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testimony, there are no VN records showing that he paid Fast Start bonuses to his five subordinates in September 2005, and all of the witnesses Caldwell identified as his sources of information about the bonuses testified that they either did not remember the bonuses or did not discuss them with Caldwell.

III. ANALYSIS

A. VN AND CALDWELL MADE CONTRIBUTIONS IN THE NAME OF ANOTHER IN VIOLATION OF 2 U.S.C. § 441f, AND VN MADE AN EXCESSIVE CONTRIBUTION IN VIOLATION OF 2 U.S.C. § 441a(a)

In response to the evidence outlined in the GC Brief, Respondents principally make four arguments: (1) that the VN payroll records are inconclusive or that OGC misunderstood them; (2) that the testimony provided by Prater, Martin, Mullins, and White supported Caldwell's claim that the payments were for bonuses and not reimbursements; (3) that the only evidence of a violation is the testimony of Bell, who they allege is biased and untrustworthy; and (4) that even if the allegations are true, the alleged violations are minor and inadvertent. The Respondents maintain that the \$1,000 cash payments were "Fast Start" bonuses paid to the five managers. Respondents' Brief at 10, 14.

Respondents do not dispute that: (1) Caldwell provided \$1,000 cash from VN to each of his five subordinate managers on September 16, 2005; (2) that when Caldwell distributed the \$1,000 cash to them, he discussed their making contributions to VBFC; (3) all five of Caldwell's subordinates who received the \$1,000 in cash made \$1,000 contributions using personal checks payable to VBFC either that same day (Prater, Martin, Mullins, and White) or the next day (Bell); and (4) that all five contributions were collected and forwarded to VBFC in a single envelope. The only issue in dispute is whether Caldwell's five \$1,000 payments to his subordinates were legitimate bonuses or whether they were VN contributions to VBFC in the

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1 names of others in violation of 2 U.S.C. § 441f. The weight of the evidence supports the
2 conclusion that Caldwell's payments were not legitimate bonuses but rather were contributions
3 to VBFC made by VN in the name of others.

4 Respondents argue that the outcome of this matter hinges solely on the memory of one
5 allegedly biased and untrustworthy witness, Carlo Bell, and that the GC Brief relies too heavily
6 on Bell's affidavits. Respondents' Brief at 2, 6-9. There are indeed two versions of the events at
7 issue in this matter. Bell alleges that he was directed by Caldwell to use the \$1,000 cash
8 Caldwell gave him to make a contribution to VBFC and that the cash was not a bonus. Caldwell
9 asserts that he gave \$1,000 bonuses to each of his five subordinates, including Bell, and merely
10 suggested that they should contribute to VBFC. Although Respondents assert that the issue
11 should be decided upon the basis of personal credibility by reference to unrelated accusations
12 against Bell, the objective documentary evidence -- VN's own relevant accounting and payroll
13 records -- as well as the relevant testimony of other witnesses, resolves the conflicting accounts
14 in favor of a conclusion that Caldwell's payments to his five subordinate managers were not
15 bonuses, but rather were contributions to VBFC to be made in the names of those managers.²

² Respondents also dispute Bell's statement that he did not receive cash bonuses. See Respondents' Brief at 19 and Exhibit G. However, the only support for this contention is an affidavit from Curtsinger. Curtsinger Supp. Aff. at ¶ 3, attached as Exhibit G to Respondents' Brief. Curtsinger previously testified that since 2001, Caldwell had full authority and discretion regarding bonuses for the new cars, used cars, and finance departments. Curtsinger Depo at 56. Furthermore, Curtsinger's Affidavit states only that Bell was *eligible* for the September 2005 Fast Start bonus, Curtsinger Supp. Aff. at ¶ 3, but makes no claim that Bell in fact received the September 2005 Fast Start bonus. *Id.* Moreover, the only example cited by Curtsinger of cash bonuses that Bell received were those in conjunction with annual sales and service contests that involved a cruise or trips to Jamaica or Mexico during which every attendee was given \$1,000 cash bonuses. *Id.* at ¶ 6. Even if Curtsinger's statements are accurate, such contest prizes are very different from the monthly cash Fast Start bonuses for sales activity early in the month, which respondents do not claim Bell ever received before. See GC Brief at 10; Hires Depo at 24; Caldwell Depo at 44; Mullins Depo at 16; Prater Depo at 34; and Martin Depo at 33.

Respondents also suggest that OGC's use of statements made by respondent Brad Combs, a VN finance manager, during an interview should be discounted because Respondents do not have a transcript of the interview. Respondents' Brief at 19, note 16. Combs is represented by Christopher DeLacy, who is counsel for Respondents here, and Mr. DeLacy was present for the interview of Combs. Respondents have neither contested any representation made by Combs nor supplemented the record with an additional statement by Combs.

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1 Likewise, the testimony of the conduits who are still his subordinates at VN and who similarly
2 indicated that the funds that Caldwell gave them were bonuses and not reimbursements, is
3 undermined by the VN accounting and payroll records, which do not support the explanation that
4 the payments were bonuses.

5 **1. The VN Records Contradict Caldwell's Claim that the \$5,000 Cash That**
6 **He Gave to His Subordinates Were Legitimate Bonuses**

7
8 During the entire pendency of this matter, Respondents have failed to produce a single
9 document that supports their contention that the \$5,000 Caldwell paid to his five subordinates
10 were bonuses, and their Brief includes few citations to evidence in this matter. In fact, VN
11 accounting and payroll records demonstrate that the \$5,000 were not bonuses.³
12

³ Neither Respondents nor the four Caldwell subordinates still working for VN acknowledged in the response to the complaint, or the accompanying affidavits, that Caldwell had given his subordinates \$1,000 almost immediately before they each contributed \$1,000 to VBFC, as Bell alleged. The first such acknowledgment was in the Respondents' response to the Commission's subpoenas. See Respondents' Response to Commission Subpoena dated September 21, 2009 at 3 and at bates VND 170. The Respondents included in that subpoena response a copy of a \$5,000 check payable to cash dated September 16, 2005, the same day as the contributions to VBFC made by Prater, Martin, Mullins and White, and one day before Bell's contribution. Respondents asserted in the subpoena response never later that this check, discovered during the document review process, was used to pay bonuses to Bell, Prater, Martin, Mullins, and White. *Id.* Caldwell conceded that it was his handwriting at the bottom of the copy of the check produced to the Commission, which stated that the check was used to pay bonuses to Bell, Prater, Martin, Mullins and White, and that he made these notations on the copy of the check on or about September 16, 2009, four years after the check was written and cashed and five days before it was provided to the Commission. Affidavit of Donald M. Caldwell dated October 14, 2009 at 1; Caldwell Depo at 39-40; and GC Brief at 11.

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**a. The VN Accounting Records for the \$5,000 Check Caldwell
Obtained from VN, Unlike the Records for All Cash Bonuses from
2003 to 2007, Do Not Indicate that the \$5,000 Check Was Cashed
to Pay Bonuses**

In response to the Commission's subpoena, Respondents produced accounting records for all cash bonuses paid from 2003 to 2007, comprised of copies of the VN checks payable to cash and the accompanying accounting record indicating for what the check was used. See VND October 15, 2009 Submission at Exhibit A. Of all the VN cash bonus checks and records in the five years of cash bonus records produced by VN, there was only one check record that did not indicate that the check was to be used for a bonus: the \$5,000 check dated September 16, 2005, that was cashed and distributed by Caldwell to his subordinates. See *id.* at DC 405 to 406; GC Brief at 15-16.

Respondents' only explanation for the unique difference between the accounting records for the \$5,000 check in question in this matter and the records for every other cash bonus check is speculation that someone other than VN controller/office manager Christina Hires handled the check request, noting that the check record includes the initials "TW." See Respondents' Brief at 14-15. In fact, Hires testified in detail about the \$5,000 check and her involvement in its creation. See Christina Hires Depo at 19-23. Hires's own signature, along with the signature of Caldwell's brother, Darrin Caldwell, appears on the check, and, according to Hires, those signatures indicate that she and Darrin Caldwell approved the issuance of the check. Hires Depo at 19, 22. Further, Hires reports to Curtsinger, and she testified that it is her standard practice to provide a copy of such checks to Curtsinger to allow him an opportunity to reject the issuance of the check, which he did not do in this case. *Id.* at 23.

Even though Caldwell testified that he would have been the person who requested the check and that his request would have been verbal, Caldwell Depo at 56-57, the record for the

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1 \$5,000 check does not indicate that Caldwell verbally requested the check, which would have
2 been indicated by the remark "Per Don." Hires Depo at 21; VN October 15, 2009 Submission at
3 Exhibit A at DC 406. Hires initially testified that she did not know who would have received
4 Caldwell's request, Hires Depo at 22, but later in her deposition testified that the record for the
5 \$5,000 check included not only the remark "TW," but also the remark "per TH," which meant
6 per Tina (Christina) Hires, that is, that Hires was probably the person who received the call and
7 who was asked to get the check. Hires Depo at 74. Hires, in turn, directed another employee to
8 type the check. *Id.*⁴

9 **b. The VN Payroll Records Demonstrate that the \$5,000 Cash That**
10 **Caldwell Distributed to His Subordinates to Make Contributions**
11 **to VBFC Was Not For Bonuses**
12

13 The VN payroll system, which necessarily records any cash bonuses paid to VN
14 employees, has no record of the five \$1,000 cash payments that Caldwell made to his
15 subordinates. As Respondents correctly note, if VN paid a bonus to any of its employees, that
16 bonus would be reflected in some fashion in VN's payroll records. Respondents' Brief at 13
17 ("VN must accurately record all compensation for tax and other business purposes"). As we
18 discussed in the GC Brief, in fact, bonuses that are paid in cash result in the creation of specific
19 entries in the VN payroll system. GC Brief at 16-17. According to Shelby Curtininger and
20 Christina Hires, a cash bonus must be recorded in the payroll system as a receivable separately
21 *deducted* from the employee's paycheck. That is, the payroll records must *both* include the
22 amount of the cash bonus in the amount of compensation being taxed *as well as* a deduction for
23 that amount on the paycheck itself to reflect that the cash bonus had already been paid to the
24 employee. Regardless of how the bonus amount is categorized (salary, draw, commission,

⁴ Hires also testified that VN used written check request forms at the time but she could not find a written check request for the \$5,000 check. *Id.* at 18, 20-21.

1 bonus) or whether it is separately categorized in the payroll system, the fact that the bonus was
2 paid *in cash* requires a specific entry that deducts the cash bonus amount from the compensation
3 that is otherwise included in the check. Without that deduction from the amount of the
4 paycheck, the employee would both receive the cash bonus in advance of the paycheck and also
5 receive the bonus a second time in the paycheck itself.⁵ As explained in the GC Brief, the
6 payroll records for the recipients of the \$1,000 cash payments from Caldwell do not include any
7 \$1,000 receivables (deductions) that would otherwise indicate that they had received \$1,000 cash
8 bonuses. GC Brief at 16-17.

9 On this critical issue, the Respondents' Brief is silent. Respondents instead discuss at
10 length the undisputed and unremarkable concept that salespeople are generally paid bonuses and
11 commissions; they attach a letter from the President of the Florida Automobile Dealers
12 Association to that effect; and they further argue the undisputed fact that the VN payroll system
13 does not contain consistent descriptions of bonuses and commissions. Respondents' Brief at 15-
14 19 and Exhibit F. These points are irrelevant as to whether the VN payroll records show that the
15 recipients of the \$1,000 cash payments from Caldwell received \$1,000 *in cash* in addition to the
16 amount included their payroll checks. As explained above, the VN records do not indicate that
17 Caldwell's subordinates received cash bonuses. Accordingly, VN's payroll records, like its
18 check accounting records described above, contradict Respondents' contention that the \$1,000
19 payments were bonuses.

⁵ Although Hires, like Curtsinger, testified that cash Fast Start bonuses are both added to and then deducted from an employee's payroll so that the bonus amount is taxed, Hires Depo at 28, Hires also testified that managers report to her the amount of the commission she is to pay to an employee and speculated that a manager might deduct the amount of a cash bonus from the amount of an employee's reported commission. Hires Depo at 52-53. Such a practice would have the effect of the bonus not being recorded in the VN payroll records or taxed.

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2. Caldwell's Testimony that the \$5,000 He Distributed to His Subordinates Was For Fast Start Bonuses Is Contradicted By the Testimony of Caldwell's Subordinates and the VN Committee

Caldwell testified that he used the \$5,000 VN check to pay Fast Start bonuses to Bell, Prater, Martin, Mullins and White even though (1) he testified to having no memory or records of the bonuses; (2) VN's accounting office had no records indicating that the \$5,000 check was for bonuses; and (3) VN payroll records had no indication that Caldwell's subordinates received cash bonuses. Caldwell explained that he determined that the \$5,000 he distributed was for Fast Start bonuses based on what Christina Hires and the four remaining managers told him when he was preparing a response to the Commission's discovery requests. Caldwell Depo at 43-44, 90-91.

However, those five individuals testified that they either did not remember the bonus or did not discuss it with Caldwell. GC Brief at 12-13; Prater Depo at 45-47 (neither Caldwell nor Curtsinger ever asked him about his contribution to VBFC, he never helped Caldwell look for documents or clarify the facts regarding his contribution, and Caldwell never asked for Prater's help in remembering the events that led to his making the contribution); Hires Depo at 7-8, 39-40, 44-49, 58, 62-64 (she had no discussions with Caldwell about this matter, she has no memory of this particular check or purported bonus recipients, and she was unable to identify the purported bonuses in the payroll records of the bonus recipients); Mullins Depo at 32-34 (after he made his contribution, he never spoke with Caldwell or anyone else about what he remembered of his contribution to VBFC); White Depo at 35-36, 58-59 (he was not aware of anyone asking him questions about his contribution after he made it and that he did not remember talking to any other VND managers about it); Martin Depo at 71-72 (Martin did not remember what Caldwell said during the meeting but rather was "guessing in general the way it

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1 was" by putting together "little bits and pieces" of what others told him had happened, including
2 Caldwell, who told Martin what he remembered saying). Moreover, two subordinates, Mullins
3 and Prater, testified that they were not at the September 16, 2005, meeting. Mullins Depo at 27-
4 28; Prater Depo at 20-25. Although White and Martin testified about the meeting, Martin only
5 recalled what the other managers and Caldwell later told him, and White testified both that he
6 did not remember whether he received the bonus and that they were asked in the meeting to
7 contribute their bonuses to VBFC. Martin Depo at 69-72; White Depo at 63-55.

8 **3. By Making Contributions in the Name of Another Totalling \$5,000, VN**
9 **Made an Excessive Contribution in Violation of 2 U.S.C. § 441a(a)**

10
11 In the 2006 election cycle, the individual contribution limit for giving to candidate
12 committees was \$2,100 per election. The contributions of a partnership are attributed to both the
13 partners and the partnership itself, that is, the partnership itself is subject to the contribution limit
14 in effect at the time for individuals. See 11 C.F.R. § 110.1(e). Accordingly, a partnership that
15 reimbursed contributions totaling more than \$2,100 per election in the 2006 cycle would also
16 have made an excessive contribution in violation of 2 U.S.C. § 441a(a). Because VN is taxed as
17 a partnership and, acting through Caldwell, the General Sales Manager, reimbursed \$5,000 of
18 contributions by Caldwell's subordinates to VBFC on September 16, 2005, for the 2006 primary
19 election, VN exceeded the \$2,100 per election limit on contributions in the 2006 election cycle.

20 **4. Respondents' Violations Were Knowing and Willful**

21 Contrary to Respondents' assertion, the violations in this matter are not "minor and
22 inadvertent." See Respondents' Brief at 3. The evidence demonstrates that Caldwell directed his
23 subordinates to make contributions to the political campaign of the person who holds the
24 majority interest in VN, the company for whom they all worked, using VN funds. In so doing,
25 VN made contributions to VBFC in the name of Caldwell's subordinates in violation of 2 U.S.C.

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1 § 441f. Respondents' claim that their violations were at most inadvertent is contradicted by the
2 evidence that Caldwell requested the \$5,000 cash from the VN Accounting office, gave it to his
3 five subordinate managers, and directed them to use those funds for contributions to VBFC. The
4 purpose and effect of this action was to mask a contribution of VN funds to VBFC as
5 contributions of Caldwell's five subordinates.

6 These circumstances indicate that VND and Caldwell's violations were knowing and
7 willful. The phrase "knowing and willful" indicates that "acts were committed with a knowledge
8 of all the relevant facts and a recognition that the action is prohibited by law...." H.R. Rpt. 94-
9 917 at 3-4 (Mar. 17, 1976) (reprinted in Legislative History of Federal Election Campaign Act
10 Amendments of 1976 at 803-04 (Aug. 1977)); see also *National Right to Work Comm. v. FEC*,
11 716 F.2d 1401, 1403 (D.C. Cir. 1983) (citing *AFL-CIO v. FEC*, 628 F.2d 97, 98, 101 (D.C. Cir.
12 1980) for the proposition that "knowing and willful" means "'defiance' or 'knowing, conscious,
13 and deliberate flaunting' [sic] of the Act"); *United States v. Hopkins*, 916 F.2d 207, 214-15 (5th
14 Cir. 1990). The *Hopkins* court also held that taking steps to disguise the source of funds used in
15 illegal activities might reasonably be explained as a "motivation to evade lawful obligations."
16 *Hopkins*, 916 F.2d at 213-14 (citing *Ingram v. United States*, 360 U.S. 672, 679 (1959)) (internal
17 quotations omitted).

18 The conclusion that VND and Caldwell's violations of 2 U.S.C. §§ 441a(a) and 441f
19 were knowing and willful is supported by: (1) VND's accounting records for the \$5,000 check
20 concealing its purpose unlike every other VN check cashed to pay cash bonuses; (2) the VND
21 payroll records concealing that the managers in question received \$1,000 cash bonuses; and (3)
22 Caldwell's disregard for Bell's questioning the legality of the reimbursement. VND appears to
23 have deliberately disguised its excessive contribution to VBFC in violation of 2 U.S.C. § 441a(a)

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1 because Curtsinger, Caldwell, Silvia Caldwell, and Darrin Caldwell all contributed precisely
2 \$4,200 to VBFC in the 2006 election cycle, the maximum allowable combined contributions for
3 a candidate's primary and general elections in that cycle, which indicates an awareness of the
4 contributions limits in effect for the 2006 election cycle.

5 Moreover, knowing and willful violations of Section 441f are not minor. Congress
6 emphasized the seriousness of knowing and willful violations of Section 441f when it set a
7 special elevated civil penalty range of 300% to 1,000% of the amount in violation. See BCRA
8 § 315(a); 2 U.S.C. § 437g(a)(5)(B).

9 **5. Recommendations**

10 Based upon the discussion above, and the reasons set forth in the GC Brief, this Office
11 recommends that the Commission find probable cause to believe that 1099 L.C. d/b/a Venice
12 Nissan and Donald Caldwell knowingly and willfully violated 2 U.S.C. § 441f by making \$5,000
13 in contributions to VBFC in the name of another and VN knowingly and willfully violated
14 2 U.S.C. § 441a(a) by contributing more than \$2,100 per election in 2005 to VBFC.

15 **B. CONCLUSION**

16 The evidence shows that Caldwell's five subordinates all made contributions in the same
17 amounts at nearly the same time and did so almost immediately after Caldwell gave them each
18 the same amount of money, in cash, and directed them to use that money for contributions to
19 VBFC. All of the subordinates' contributions were forwarded to VBFC in a VN envelope
20 containing their contributions, Caldwell's contributions, and the contributions of other Caldwell
21 relatives. Although Respondents assert that Caldwell's \$1,000 cash payments to each of his five
22 subordinates was a bonus and not a reimbursement, the VN accounting and payroll records
23 completely fail to show that these funds were used for cash bonuses. Because Caldwell

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1 requested the check, directed his subordinates to make the contributions in exchange for
2 matching VN funds, and the nature of the reimbursement appears to have been concealed by not
3 having a record of the purpose of the check or payroll records reflecting the payment,
4 Respondents' violations were knowing and willful. Accordingly, we recommend that the
5 Commission find probable cause to believe that 1099 L.C. d/b/a Venice Nissan knowingly and
6 willfully violated 2 U.S.C. §§ 441f and 441a(a) and that Donald M. Caldwell knowingly and
7 willfully violated 2 U.S.C. § 441f.

8 **IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

9 A proposed conciliation agreement covering the violations committed by VN and Donald
10 Caldwell is attached.

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5 **V. RECOMMENDATIONS**

6 1. Find probable cause to believe that 1099 L.C. d/b/a Venice Nissan knowingly and
7 willfully violated 2 U.S.C. § 441f.

8

9 2. Find probable cause to believe that 1099 L.C. d/b/a Venice Nissan knowingly and
10 willfully violated 2 U.S.C. § 441a(a).

11

12 3. Find probable cause to believe that Donald M. Caldwell knowingly and willfully
13 violated 2 U.S.C. § 441f.

14

15 4. Approve the attached conciliation agreement.

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17 5. Approve the appropriate letters.

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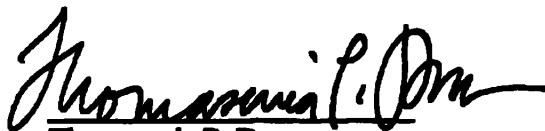
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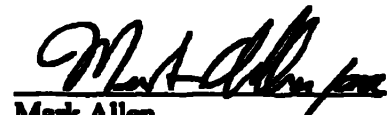
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Thomasenia P. Duncan
General Counsel


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